

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:     )

Maria Helen Melbourne Hayes, M.D.     )

Physician's and Surgeon's     )

Certificate No. G 75089     )

Respondent.     )

Case No. 20-2005-171087

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**DENIAL BY OPERATION OF LAW  
PETITION FOR RECONSIDERATION**

No action having been taken on the petition for reconsideration, filed by Deputy Attorney General David Carr, and the time for action having expired at 5 p.m. on September 17, 2009, the petition is deemed denied by operation of law.

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:	)	
	)	
	)	MBC No. 20-2005-171087
MARIA HELEN MELBOURNE HAYES, M.D.	)	
	)	
Physician's & Surgeon's	)	
Certificate No. G 75089	)	
	)	
	)	
_____ Respondent.	)	

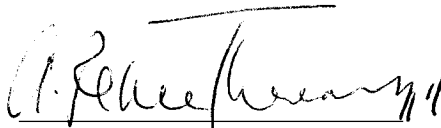
**ORDER GRANTING STAY**

Deputy Attorney General David Carr has filed a Petition for Reconsideration of the Decision in this matter. A stay of execution of the Decision is hereby granted.

Execution is stayed until September 17, 2009.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: September 9, 2009



A. Renee Threadgill  
Chief of Enforcement  
Medical Board of California

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

**MARIA HELEN MELBOURNE HAYES, M.D.**  
East Moriches, N.Y.

Physician's and Surgeon's Certificate  
No. G 75089

Respondent.

CASE NO. 20-2005-171087

OAH No. 2007090059

**DECISION**

The Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Medical Board of California (Board) as its decision in the above-entitled matter, except as specified below:

1. Pursuant to the provisions of Government Code Section 11517(c)(2)(B), the proposed penalty is reduced as follows:

**ORDER**

A. Upon the effective date of this Decision, a letter of Public Reprimand shall be issued against Maria Helen Melbourne Hayes, M.D., Physician's and Surgeon's Certificate No. G 75089, and

B. Respondent is provided with a copy of sections 2227, 2234(b), 2242(a) and 2266 of the Business and Professions Code;

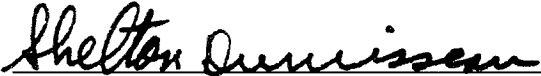
2. Pursuant to the provisions of Government Code section 11518.5(d), the Board hereby corrects the Proposed Decision to delete any references to the Board investigator's alias in the above-entitled manner.

WHEREFORE THE ABOVE IS SO ORDERED by the Medical Board of California.

So ordered on August 11, 2009,

This Decision shall become effective at 5:00 p.m. on September 10, 2009.

MEDICAL BOARD OF CALIFORNIA

  
Shelton Duruisseau, Ph.D.  
Chair, Panel A

BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MARIA HELEN MELBOURNE HAYES,  
M.D.  
East Moriches, N.Y.

Physician and Surgeon's Certificate  
No. G 75089

Respondent.

CASE NO. 20-2005-171087

OAH No. 2007090059

**PROPOSED DECISION**

This matter was heard before Ann Elizabeth Sarli, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, February 17, 2009, through February 20, 2009, in Sacramento, California.

Complainant, David T. Thornton, Executive Director of the Medical Board of California (Board), was represented by David Carr, Deputy Attorney General.

Maria Helen Melbourne Hayes M.D. (respondent) was represented by Robert Zaro, Attorney at Law.

Evidence was received and the record remained open to permit the parties to file closing briefs. Complainant's closing brief was filed on March 20, 2009, and marked for identification as Exhibit 16. Respondent's closing brief was filed on April 22, 2009, and marked for identification as Exhibit H. Complainant's reply brief was filed on May 18, 2009, and marked for identification as Exhibit 17. The matter was submitted and the record was closed on May 18, 2009.

**FACTUAL FINDINGS AND DISCUSSION**

1. On September 1, 1992, the Board issued Physician and Surgeon's Certificate Number G 75089 to respondent.

2. On May 22, 2007, David T. Thornton, made and filed the Accusation<sup>1</sup> in his official capacity. Respondent timely filed a Notice of Defense and Request for Hearing. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et.seq.

3. Respondent received her undergraduate degree in microbiology in 1985 from the University of Southern California. She joined the United States Armed Forces and received her M.D. in 1991 from the Armed Services Medical School in Bethesda, Maryland. She performed an internship in the Navy and completed residency as a flight surgeon. She also completed a residency in family medicine and family practice and was licensed in California in 1992. She was licensed as a physician and surgeon in the state of New York in 2001. Respondent has been board certified in family practice since 1997. In 2001, respondent separated from the Navy, but remained as a reserve officer. She married and moved to New York. She had three children and did not practice medicine, except as a naval reserve officer.

4. In April or May 2005, while pregnant with her third child, respondent considered re-entering the work environment. She had worked as locum tenens in California and through those associations learned of a company named TelaDoc, which provides its members with telephonic consultations with physicians. As a TelaDoc physician, she could work from home by telephonically consulting with patients from New York and California. She signed up with TelaDoc to work as a consulting physician. It was respondent's involvement with TelaDoc which gave rise to the allegations herein.

5. On Friday, December 23, 2005, California Medical Board Supervising Investigator, Andrew Hegelein entered the TelaDoc.com website and downloaded the materials on the website. The website bore the logo "TelaDoc: Affordable Health Care. Talk to Doctor 24/7" and advertised "more convenient, cost-effective medical care." The website offered "membership" in "retail" medical plans. Retail plans consisted of single plans, couple plans, family plans, and the 7 + family plan. Each plan had a "recurring monthly fee" of between \$4.25 and \$7 plus \$1 for each additional dependent. In addition to the monthly recurring fee, registration fees were \$18 for the registrant, \$18 for each dependent and \$35 for each consultation. The website provided that "...all fees are non-refundable with the exception of the recurring [monthly] fees. If you cancel membership within 30 days and have not used any of our services (Intake Exam, Consult, etc.) your recurring fee will be refunded."

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<sup>1</sup> At the close of hearing, complainant moved to amend the Accusation to conform to proof. Over respondent's objection, page 7, paragraph 18 was amended, to insert the following language on line 25: "Respondent entered a chart note indicating she had discussed a possible need for rest and ice with this patient. Respondent had not discussed either rest or ice with this patient." Given the timing of the amendment, respondent did not have the opportunity to prepare a defense to the new allegation. Accordingly, the new allegation was severed from this proceeding to afford respondent a reasonable opportunity to prepare her defense. (Government Code sections 11507 and 11507.3, subdivision (b).)

6. In order to receive services through TelaDoc, a consumer was required to register online as a member, select a plan and pay the fees with a credit card. The website stated “Completing this registration form puts you on the path to more convenient, cost-effective medical care.” The registration form contained fields for user name, password and personal information including name, gender, date of birth, address and billing information. The registration form also contained fields for the name, address and phone number of the registrant’s primary doctor and pharmacy.

7. In order to complete registration, the registrant was required to read and agree to certain terms and conditions. A section of the registration form was entitled “Read and Agree to the Terms & Conditions” and contained the following language: “You must READ and AGREE to the Cyber Medical Services Terms and Conditions which include our Privacy Policy before you will be allowed to submit your Registration.” There was a box the registrant checked which stated “I agree to the Cyber Medical Services Terms and Conditions.” “The Cyber Medical Services Informed Patient Consent: Terms And Conditions” read as follows:

Cyber Medical Services (CMS) is the organization that allows its members to access services from TelaDoc Professional Association of Physicians (TPAP). I understand that CMS is neither an insurance provider nor an entity to reimburse any medical expenses that I may incur in the use of the CMS family of services. I understand and agree that completing the medical history disclosure does not guarantee that I will...

The remaining terms and conditions of the registrant's agreement with CMS were not a part of the record.

The terms and conditions for registration as a member of TelaDoc also included an acknowledgment under the heading “TELEDOC INFORMED PATIENT CONSENT TERMS AND CONDITIONS.” In pertinent part, these terms and conditions included the following language “I understand that TelaDoc Professional Association of Physicians (TPAP) is a fee-for-service primary care telemedicine practice. I understand and agree that I am entering into a Doctor Patient relationship with the healthcare providers of TPAP. I understand that each medical consult will be paid for in advance by me.”

8. There was no competent evidence in the record that, on December 23, 2005, the TelaDoc registrant was required to acknowledge that he was assigning the TelaDoc or TPAP physician as his “cross coverage” or “on call” physician. Respondent introduced into evidence a document she claims was part of the TelaDoc website in December 2005 (Exhibit C). The document is undated and is entitled “Current Sites.” It states “The following boxes display the current Terms and Conditions on the Call Center and Member sites and the paper MHD.” The “Current T&C: Member Site” reads:

## TELADOC, INC. INFORMED PATIENT CONSENT TERMS AND CONDITIONS.

TelaDoc, Inc. is the organization that allows its members to access services from TelaDoc Professional Association of Physicians (TPAP). I understand that TelaDoc, Inc. is neither an insurance provider nor an entity to reimburse any medical expenses that I may incur in the use of the TelaDoc, Inc. family of services. I understand and agree that completing the medical history disclosure does not guarantee that I will be accepted as a patient by any of the independent associated healthcare providers. I understand that unlike most healthcare providers, TPAP does not use pre-existing conditions to determine whether or not I will be accepted as a patient. In the event a healthcare provider accepts me as a patient, being a TelaDoc member will entitle me to receive services from the healthcare provider at a reduced fee.

My relationship with the TelaDoc health care providers is a separate and exclusive patient physician relationship between myself and TPAP. I agree to assign TPAP as my cross coverage physician when my regular doctor is not available. I understand and acknowledge that TelaDoc, Inc. has no claim to my medical data nor is TelaDoc, Inc. providing medical services. TelaDoc, Inc. shall not collect nor provide medical information without express written consent from myself. I agree to the terms of this relationship with TelaDoc, Inc.

9. Exhibit C does not appear to have been on the TelaDoc website on December 23, 2005. It refers to "TelaDoc, Inc." an entity that was not referenced in any of the materials which appeared on the December 23, 2005 website. The December 23, 2005 website referenced Cyber Medical Services and CMS, an entity that is not referenced in Exhibit C. The website references Cyber Medical Services as "the organization that allows its members to access services from TelaDoc Professional Association of Physicians (TPAP)." Exhibit C references TelaDoc, Inc. as "the organization that allows its members to access services from TelaDoc Professional Association of Physicians (TPAP)." The weight of the evidence is that the "Current Sites" document introduced in evidence as Exhibit C was not on the TelaDoc website on December 23, 2005 when Mr. Hegelein logged onto the website. Accordingly, Mr. Hegelein did not "accept" the language "I agree to assign TPAP as my cross coverage physician when my regular doctor is not available" when he registered with TelaDoc.

10. Mr. Hegelein registered with TelaDoc under the fictitious name M. [REDACTED] R. [REDACTED]. Once he registered and paid the appropriate membership fees by credit card, he was directed to fill out a Medical History Disclosure form (MHD), which requested information on height and weight, physical problems which he was experiencing and history of pre-existing conditions and conditions that were in his family medical history. Mr. Hegelein filled out the MHD and indicated that he was presently taking Vicodin, he last had a physical examination in April of 2005, and that he had a primary care physician. He checked "yes" to questions that he had problems with his neck or back and problems with joints or muscles. He then called TelaDoc for a consultation, at approximately 11:30 a.m. and recorded the conversation.

11. A woman named Jennifer answered the call and verified that M. [REDACTED] R. [REDACTED] was a TelaDoc member. She conducted a "phone intake interview" and indicated a phone interview is necessary to "ensure we provide you with efficient quality service in the future." She asked for his address and pharmacy information and verified that he wanted to schedule a physician consult. Mr. Hegelein gave Jennifer his credit card information and authorized payment of a \$35 physician consultation fee.

12. TelaDoc contacted respondent and she accessed Mr. Hegelein's MHD and telephone number. Respondent then called Mr. Hegelein, who continued to represent himself as M. [REDACTED] R. [REDACTED]. She asked "How can I help you today?" He told her his back has "really been acting up" and he wanted to try to get "something to control the pain" before Christmas because he did not want to go through the holiday in this much pain. She asked him if he had any surgeries and how long he had back pain and whether it was ongoing. He told her that his back pain had been ongoing for over a year but it really started acting up in the last month. She asked if he has seen a doctor for this and he indicated he hadn't really seen a doctor for this. She asked if he had dizziness or pain in his side or in his legs and he replied not in his legs. She asked if the pain was in his lower back and mid back and he replied it was "really up towards the shoulder more now." She asked if he had done anything to aggravate it and he replied that he had not been sleeping well and when he woke up he had the most pain. She asked if he had gone to physical therapy "or anything like that" and he replied no.

13. Respondent asked Mr. Hegelein if there was an inciting incident that gave rise to the back problem or whether it just came on and he replied that about 18 months ago he was doing a lot of heavy landscaping and it "really just started bothering me." He explained that the pain had been all over, in the upper shoulder area and in the lower back but that "right now" it was bothering him in the upper back area in the shoulders and neck. She asked him if he had full range of motion of his neck and he replied that it was painful to move his neck around. She asked if he ever tried anything like muscle relaxers and he replied he had been getting Vicodin last year. He explained he was unable to get Vicodin anymore and he was just trying to be

strong and bear with it and now he would just like to get some more so he could get through the holiday. She explained that she does not prescribe narcotics and asked whether he had had x-rays or weakness in his arms. He replied no. She asked if he'd ever tried a muscle relaxer like Flexeril or Robaxin. He replied no. He told her the pain did not really feel muscular but felt more like "it was his joints" He said his "neck, shoulder, and joints and all were very sore." He said it was quite painful when he wakes up and it was hard to get out of bed. She asked if he had any trauma and he said no specific event just over the whole summer he'd been doing a lot of landscaping and heavy lifting and that's when it really started to hurt.

14. Respondent then asked Mr. Hegelein "Now, do you have a primary care doctor?" He replied "no." She then asked "Now do you have insurance? Most people say they don't have insurance." He replied "Not anymore." She then said "Okay, because you are an independent contractor or something?" He replied "yes."

15. Mr. Hegelein made several attempts while talking with respondent to inveigle her into prescribing narcotics for him. She declined. She asked him if he had tried other things such as Motrin. He replied he had tried 800 mg of ibuprofen and that it had been okay but it really didn't last.

16. Mr. Hegelein repeated that "all of my joints are really sore." Respondent asked him if he exercises and he said he plays some soccer and he mountain bikes and he has snowboarded in the past, but hasn't this year because it hasn't been comfortable. She asked when he had last had a physical. He told her he thinks it was in April of 2005. She asked him if the doctor he saw in April evaluated his musculoskeletal system for his back pain. He said no because at the time he was doing okay. She then asked him when he got the Vicodin that he had been taking and he explained about this time last year. He explained he had taken it for about three months, three times a day, because when he woke up he would be in pain and that he would take it in the afternoon before mountain biking or snowboarding. He said that about three months ago he just didn't need the Vicodin anymore. Respondent asked him if it feels like the pain has returned and he said yes.

17. Respondent then explained to Mr. Hegelein that she could prescribe Ultram for pain but that "Ultram is not a good thing." She agreed to give him a "little bit of Ultram." She explained the Ultram was for severe pain. She explained that a lot of times the pain is due to inflammation and that's why nonsteroidal anti-inflammatories like Motrin, Naprosyn and Anaprox would be good. She told him she would give him 30 tablets of 800 Motrin and 10 tablets of Flexeril. She explained again that the Ultram was for pain which was "really severe" and told him that she would give him a few but if he needed more she should "see somebody." She explained that Ultram is "supposed to be non-addicting, and they're similar to... a Vicodin." She explained she would give 10 tablets of 100 mg Ultram, 30 tablets a Motrin and 10 tablets of Flexeril. She said "And just see how that does. But I recommend that if doing this regimen doesn't help you or you need you feel like you

need stronger medicine or like Vicodin again that you see somebody.... because sometimes someone does for acute knee injury, they give you Vicodin for say like 30 days. But you know- if it's like more regular than that or something then you really need somebody, because if you're gonna be in a chronic pain management or something, or physical therapy, or something like that, then-you know - you have to be looked at - examined and everything like that.” Finally, she asked him if he had any drug allergies and confirmed the phone number for the Walgreens pharmacy, in Sacramento, where he was to pick up the prescriptions. The two had a conversation wherein she confirmed she knew he was calling from California and lived in California.

18. Toward the conclusion of their conversation, respondent asked Mr. Hegelein how he found out about TelaDoc. He replied “over the internet.” He laughingly told her he was “trying to find a way to get some more Vicodin.” She told him that “... like I said Ultram is a little different, but ... that's really the policy not to give narcotics...because you can get... in trouble. You could understand - we don't know you exactly...” She explained that “...if you were in that much pain ... it's almost like you have to be looked at.” She continued “You see ... what our predicament is?” She went on to explain that she can't give out all medicines over the phone “because sometimes she would have to examine someone and get blood pressure ... .”

19. The Board alleges, among other things, that respondent improperly prescribed medications to Mr. Hegelein in violation of Business and Professions Code (B&P) section 2242, subdivision (a). That section provides that “Prescribing, dispensing, or furnishing dangerous drugs as defined in section 4022 without an appropriate prior examination and a medical indication, constitutes unprofessional conduct.”

20. Respondent maintains that her consultation with Mr. Hegelein constituted an “on call” or “cross coverage” situation as contemplated under B&P section 2242, subdivision (b)(1), and thus she was not in violation of section 2242, subdivision (a). Subdivision (b)(1), provides in pertinent part: “No licensee shall be found to have committed unprofessional conduct within the meaning of this section if, at the time the drugs were prescribed, dispensed, or furnished ... the licensee was a designated physician and surgeon or podiatrist serving in the absence of the patient's physician and surgeon or podiatrist, as the case may be, and if the drugs were prescribed, dispensed, or furnished only as necessary to maintain the patient until the return of his or her practitioner, but in any case no longer than 72 hours.”

21. Respondent maintains that TelaDoc obtained patient permission for her to act as a cross coverage physician for California callers, and thus she could prescribe for California patients over the telephone without first conducting a physical examination. Although the Business and Professions Code does not define “cross coverage” or “on call” the parties are generally in agreement that these terms are

interchangeable and refer to situations where a physician provides temporary services to another physician's patient, when that patient's physician is unavailable.

Respondent characterizes the issue as whether, for purposes of prescribing under B&P Code section 2242, a *patient* may designate another physician to cover for his physician in his physician's absence. Respondent argues that a patient may designate a cross coverage physician and that physician may lawfully prescribe medications under B&P section 2242.

22. Regardless of how respondent characterizes the issue, the evidence is persuasive that when Andrew Hegelein contacted TelaDoc and respondent, and posed as a California patient, he did not designate respondent or any TelaDoc physician, as his "on call" or "cross coverage" physician. He, in fact, told respondent that he did not have a physician (for which respondent could "cover"). From the above exchange between respondent and Mr. Hegelein it is abundantly clear that Mr. Hegelein told respondent that he did not have a physician. Nevertheless, respondent attempted to establish that she could disregard this information because Mr. Hegelein had indicated he had a primary care physician by placing a physician's name in the online registration information he completed. Respondent, rather disingenuously, asserted that it was not her place to question what he placed on the MHD form when he registered, and that she could rely on this form even though he clearly and repeatedly told her he did not have a physician. Respondent's defense that Mr. Hegelein designated her as a cross coverage physician who may lawfully prescribe medications under B&P Code section 2242 is without merit.

23. On January 4, 2006, Mr. Hegelein went to Walgreens pharmacy posing as M. [REDACTED] R. [REDACTED] and purchased the three drugs prescribed to M. [REDACTED] R. by respondent:

Tramadol/APAP (Ultracet) 37.5 mg/325 mg Tabs, QTY 12, No. 0184090-06658. The label reads "Take 1 tablet by mouth every 8 hours as needed for severe neck/upper back pain."

Cyclobenzaprine (Flexeril) 10 mg Tabs, QTY 10, No. 0184091-06658. The label reads, "Take 1 tablet by mouth every 12 hours as needed for muscle tightness."

Ibuprofen (Motrin) 800 mg Tabs, QTY 30, No. 0184093- 06658. The label reads, "Take one tablet by mouth every 8 hours as needed for neck/upper shoulder pain."

24. Acetaminophen, Tramadol Hydrochloride (generic name)/Ultracet (brand name); Ibuprofen (generic name)/Motrin, Advil (brand names) 800 mg; and Cyclobenzaprine Hydrochloride (generic name)/Flexeril (brand name), are dangerous drugs pursuant to Business and Professions (B&P) Code section 4022, subdivisions (a) and (c).

25. Mr. Hegelein requested that TelaDoc provide the medical records of M. [REDACTED] R. [REDACTED]. On March 7, 2006, the Medical Board received from Cyber Medical Services Inc. a printout of the electronic medical record of M. [REDACTED] R. [REDACTED]. The "Medical History" indicated it had been "Updated 12/19/2005 – 4:28 PM" even though M. [REDACTED] R. [REDACTED] had become a member on December 23, 2005 and his medical record had been created at that time. Respondent's chart note was properly dated and contained a "Diagnosis" of "pain: thoracic spine." The prescriptions she ordered were properly identified on her chart note, as was the fact that M. [REDACTED] R. [REDACTED] had no allergies. M. [REDACTED] R. [REDACTED]'s "Current Medications" were listed as "Vicodin."

Under the heading "SOAP NOTES" respondent had written the following:

36 y/o male c/o neck and shoulder pain for 2 days. Pt is a landscaper. Notes no specific event that started his neck and upper back pain. About 18 months ago was doing heavy landscaping- noticed soreness in neck and upper back then. Is an independent contractor- has no insurance now. Did have an exam 4/05- did not mention to Dr. that he takes occasional Vicodin for jt pain. Pain is in upper back and neck. No loss of strength in arms or radiation pain, no tingling in arms. Not sure if slept funny or something to start up this pain again. No specific injury, no MVA, no surgery, no x-rays or PT for this pain. Exercises regularly- soccer/mtn bike and snowboarding in past. Med's: Vicodin-ran out, other than that no chronic meds. Note tobacco use, ETOH- 2-4 drinks/month. A: Musculoskeletal pain/inflammatory- no neuro involvement from hx-Flexeril 10 mg 1 tablet po q 12 hours prn muscle tightness, Motrin 800 mg 1 tablet po q 8 hours, PRN muscle/neck pain, and Ultracet 37.5/325 mg 1 po q 8 hours prn more severe upper back/neck pain (#12) dispensed- Discussed with pt that they see a doctor if not improved after this regimen. Rest, ice and possible PT for full improvement may be necessary. Pt verbalized understanding of above conversation. Pharmace (sic) of choice: Walgreens 916- 480- 0979

### *Standard of Care*

### *Complainant's Experts*

*Robert Chapnick M.D.*

26. The Accusation alleges that respondent prescribed dangerous drugs to M. [REDACTED] R. [REDACTED] without first taking an adequate history and conducting an appropriate

physical examination, that she inaccurately and erroneously recorded M. [REDACTED] R.'s symptoms in responses to her diagnostic questions over the telephone and used these responses as a basis for prescribing dangerous drugs, and that she failed to keep and maintain adequate and accurate records. The Accusation alleges that these acts violated numerous provisions of the Business and Professions Code.<sup>2</sup>

27. Robert Chapnick, M.D. testified on complainant's behalf. Dr. Chapnick is board certified in internal medicine. He received his medical degree from the State University of New York in Brooklyn 1976. From 2002 to the present he has served as Chief Medical Officer - Quality Programs at California Department of Corrections and Rehabilitation. Until recently, he also served as a physician with the Santa Clara Valley Medical Center in San Jose, California, providing direct patient care in internal medicine.

28. Dr. Chapnick reviewed the telephonic recording of respondent's interview with M. [REDACTED] R. as well as the chart note respondent prepared. He concluded that the history that respondent took was insufficient to adequately diagnose back pain and that respondent failed to rule out potentially serious conditions. He found these deficiencies constitute an extreme departure from the standard of care.

29. Dr. Chapnick also found that respondent's failure to perform a physical examination of the patient, whom she had never seen, constitutes an extreme departure from the standard of care. He opined that it is necessary to perform a good faith medical examination before prescribing medications. A good faith medical examination consists of taking an adequate history for a new patient with neck and back pain, performing a physical examination of the patient focusing on the areas identified as chief complaints and further reviewing the symptoms identified. If necessary, diagnostic tests should be ordered. The standard of care requires that the physician formulate a treatment plan based on the history, examination and results of any diagnostic tests.

30. Dr. Chapnick defined a physical examination as a "literal face to face" examination of the patient. He testified that "there is clinically relevant information that cannot be obtained over the telephone." This information includes height and weight, general physical appearance, wasting, whether the patient appears his stated age, whether he walks with a limp or has abnormal gait and range of motion of neck and back. Additional information can only be gleaned from a face to face examination, such as vital signs, respiration, shortness of breath, stiffness of the neck, and examination of the lower back and neck for neurological signs. There is also the need to examine the patient to observe "red flags" such as signs of infection, wasting and fever. Dr. Chapnick opined that a physical examination was also necessary

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<sup>2</sup> The statutory provisions at issue are identified in the Legal Conclusions portion of this Proposed Decision.

because neck and back pain for several months can indicate musculoskeletal conditions, infection or malignancies, disc problems or abscesses.

31. Dr. Chapnick further opined that respondent's SOAP Notes (Subjective complaints, Objective observations or findings, Assessment and Plan) were not adequate to support prescribing medications to M. [REDACTED] R. The history lacked information which could have been obtained from a physical examination, such as the location of pain. The history documented a course of pain but the patient described the pain as a new instance of pain that really started acting up two months ago. The SOAP notes inaccurately describe the pain as neck and shoulder pain of two days duration. Respondent failed to ask clarifying questions to determine whether there may be pathological conditions manifesting in back, shoulder and neck pain. The "assessment" portion of the SOAP Note was simply a reiteration of the symptom of pain. The "plan" was inadequate in that there can be no valid plan without an adequate assessment.

32. Dr. Chapnick agreed that in limited circumstances a physician could prescribe without conducting a face-to face examination of the patient. Those circumstances are set out in B&P section 2242, subdivisions (a), and (b)(1). However, Dr. Chapnick opined that respondent's prescribing to M. [REDACTED] R. did not meet the criteria set forth in this section because she was not filling in for the patient's primary physician by agreement with the primary physician. He pointed out the respondent was aware that M. [REDACTED] R. did not have a primary care physician, as he told her this in their telephonic consultation. Dr. Chapnick also pointed out that respondent prescribed medications for a duration in excess of the 72 hour duration permitted under B&P section 2242, subdivisions (a), and (b)(1).

*Reinhardt Hilzinger M.D*

33. Reinhardt Hilzinger M.D. testified on complainant's behalf. Dr. Hilzinger received his medical degree in 1985 from the Medical College of Wisconsin. He is board certified in family medicine. He has been employed by Sutter Medical Group, a 300-physician medical group, since 1991. Dr. Hilzinger reviewed the recording of respondent's telephone interview with M. [REDACTED] R. as well as the chart note respondent prepared. He concluded that respondent deviated from the standard of care in failing to perform a medical examination of M. [REDACTED] R. and in prescribing pain medication with an inadequate history.

34. Dr. Hilzinger testified that the history respondent took was inadequate in that respondent did not thoroughly explore the location of the pain. The quality, intensity, and duration of the pain were not explored, nor were palliative and provocative measures fully explored in the history. He testified that "judging from this history" he had "no idea what was going on with this patient." Musculoskeletal problems was one of the possibilities, "but not at the top of my list." Dr. Hilzinger testified that respondent asked M. [REDACTED] R. about the location of the pain, but he first

said it was in his back, then his neck and then his shoulder. M. [REDACTED] R. then described the pain as involving the joints aching - "so the pain was moving all over the place." When M. [REDACTED] R. said he had pain in the shoulder, back and joints, he was involving several organ systems an indication that he needed to be seen by a competent physician.

35. Dr. Hilzinger opined that, with a history like the one M. [REDACTED] R. gave, ever changing throughout the consultation, respondent should have conducted a full examination of the musculoskeletal system to confirm his history and checking the range of motion of the shoulders and back. Although it was appropriate that respondent recommended to M. [REDACTED] R. that he see a physician if he did not improve, she was not relieved of her responsibility to conduct a full physical examination before prescribing the three medications, particularly the Ultram/Ultracet. Dr. Hilzinger agreed that if M. [REDACTED] R. was an established medical patient and he knew his history, he might have prescribed these medication provided M. [REDACTED] R. was seen the following day.

36. Dr. Hilzinger opined that the standard of practice requires that competent physicians may prescribe medications when covering for another physician, and when the covering physician feels comfortable prescribing and can check with the pharmacy and see if the prescribed medicine is one that has been prescribed by the primary physician. In order to prescribe medications in a phone consultation, a physician would have to be providing coverage for the treating physician's patients, with that physician's agreement.

#### *Respondent's Experts*

##### *John Morse Luce M.D*

37. John Morse Luce, M.D. testified on respondent's behalf. He received his medical degree from the University of California, San Francisco in 1974. He is board certified in internal medicine, pulmonary medicine and critical care medicine. Dr. Luce has been a member of the faculty and clinical staff of the University of California San Francisco since 1974. Currently, he is Professor of Clinical Medicine and Anesthesia at the Department of Medicine and Anesthesia at UCSF School of Medicine. He also serves as Chief Medical Officer, after serving in various capacities at UCSF. His previous position was as Medical Director of Quality, Risk Management and Managed Care programs.

38. Dr. Luce testified regarding the practice of "cross coverage" or "on call coverage" in clinical practice. He testified that, in his fellowship, he covered physicians for three years "taking call" He defined cross coverage as also including "a patient going to another doctor and his primary not being aware of this." However, "usually cross coverage is set up by arrangement where the doctors know each other." Dr. Luce does not know whether this arrangement "is obligatory or not."

39. He opined that there need not be an agreement between a primary care physician and a covering physician to designate an "on call/cross coverage" physician because "patients have a right to seek care from sources other than their primary care provider and their primary care provider need never know." Nor do they even need a primary care physician. Dr. Luce identified the issue as the patient's right to go wherever she or he pleases to go or to the Internet and seek advice. "We encourage them to participate in their health care." However, in respect to the TelaDoc model, he "has not seen this type of cross coverage before." Dr. Luce acknowledged that he was basing his opinion on the presumption that the patient was seeking a "cross coverage" service when signing up at TelaDoc. He referred to Exhibit C to confirm his belief that this was the situation depicted here.

40. Dr. Luce reviewed M. [REDACTED] R.'s computerized medical history and respondent's chart note. He testified that, based on the consultation and the chart note, his opinion, like respondent's, was that M. [REDACTED] R. had musculoskeletal pain in the area of the upper back, shoulders and neck. He based his opinion on a combination of "positive information the patient gave regarding where the pain was, where it had been in the past, and the fact that he had been a laborer and athlete." M. [REDACTED] R. had a negative history of pain with no radiation and no weakness or tingling in the arms or legs. Here, there could be "no other explanation than musculoskeletal pain based on the history given." "If the patient had any other symptoms, he would have mentioned them."

41. Dr. Luce opined that respondent was not required to conduct a physical examination "for purposes of the on call or cross coverage situation." Likewise, because this was a "cross coverage-on call situation" no new patient examination was required. He also testified that the patient's complaints were changeable and it was difficult for M. [REDACTED] R. to not focus on Vicodin. However, respondent did a good job in getting M. [REDACTED] R. to focus on his problem and in doing this got as good a history as this patient could offer. He testified that respondent was within the standard of care in her inquiries. Her notation of "pain 2 days" was a simple error that did not rise to the level of negligence. She properly diagnosed M. [REDACTED] R. with "over use" related to physical work and the expectation was reasonable that this would go away. Dr. Luce also noted that it was clear that respondent knew M. [REDACTED] R. did not have a primary care physician, but she suggested he see a physician if he did not improve.

42. Dr. Luce opined that "since this was an on call situation" there was no need to order diagnostic tests and that the prescriptions were appropriate and for an appropriate duration. He testified that in on call situations doctors prescribe amounts going beyond 72 hours and this has been the case as long as he has been an on call physician. The fact that there was a time limit on prescriptions beyond 72 hours was "news to me." He acknowledged that each prescription that respondent provided was for a duration in excess of 72 hours. In his opinion, respondent took an adequate history from an evasive patient and did a good job getting information from him and

making the decision which medications he would benefit from. He opined that the history was very thorough for an on call patient.

43. Dr. Luce also did not think the patient should have been checked for a history of rheumatoid arthritis because his history referred to joint pain in the shoulders and neck, not the fingers and elbows, where rheumatoid arthritis is more likely to manifest. The patient also did not give a history suggestive of rheumatic disease or degenerative disease. He testified that “respondent pretty well localized pain to neck back and upper shoulders - not an easy task for the doctor to do this.” In his opinion, respondent also did an appropriate job determining if there was radiculopathy and of identifying when the pain was better and worse.

*Lorne George Etherington M.D., Ph.D.*

44. Dr. Etherington received his medical degree from the University of California, San Francisco in 1967. He received a doctorate in pharmacology from the University of Washington, Seattle, in 1961. He is board certified in anesthesia and pain management and has established and run pain management programs at Stanford Hospital and Sequoia Hospital in Redwood City. In his lengthy career he has treated “a tremendous amount of patients with musculoskeletal diagnoses” and has been on call many times. He testified that “every [physician] in California has cross call coverage so they can live.”

45. Dr. Etherington testified that Exhibit C “establishes a patient doctor relationship which allows the physician to perform as a cross-covering [on call] physician.” He reviewed respondent’s chart note for M. [REDACTED] R. “in the context of cross coverage.” He testified that “this is cross coverage because that is what was agreed to by the hypothetical patient so it is pretty obvious that is the situation that developed.”

46. Dr. Etherington testified that it was “pretty clear from what the patient said and the preliminary screening that he had back pain and wanted help over the holidays and elected to phone respondent’s group.” He opined that the patient’s pain was episodic and not chronic because he had not been seeing a doctor, was not taking medications and was “doing stuff.” He testified that it was appropriate for respondent to prescribe the medications she prescribed and the dosages were appropriate and conservative. He testified that she met the standard of care for taking a history and charting M. [REDACTED] R.’s consult and that diagnostic tests and follow ups were not required because this was an on call situation.

*Oscar Boultinghouse M.D.*

47. Dr. Boultinghouse is a graduate of Baylor College of Medicine and Harvard School of Public Health. He is board certified in emergency medicine and is

licensed in Texas, but not in California. He is a stockholder of TelaDoc and was instrumental in its formation. However, he testified that he is not involved in the operation of TelaDoc. He testified that the TelaDoc model is limited to cross coverage and defined cross coverage as the situation where a patient has a designated primary care doctor who is not available to return phone calls or answer medical questions, and a TelaDoc physician is available to the patient to act as designated physician. He pointed out that the patient uses the internet and the telephone to consult with TelaDoc physicians and must agree that s/he is designating the physician as a cross coverage physician before the consultation can take place. He testified that repeat activity is very small and that the most frequent call was “whether I need to see a doctor or go to emergency room,” followed by “second opinions because primary doctor had no time to answer questions.” Dr. Boultinghouse testified that if a patient called back within two weeks with the same problem, the new physician would have the record and see a recent use of service and depending on the circumstances of the request would make a judgment whether it is appropriate to meet the request. This “prevents the TPAP doctor from becoming an ongoing medical home for this patient ... the intent is episodic issues.”

48. Dr. Boultinghouse’s testimony conflicts completely with the fact that a patient must be a “member” to receive services and pays membership dues monthly. Obviously, the consumer’s expectation is that the service would be used often enough to justify the monthly expenses. Nothing on the website, in December 2005, stated that only episodic, infrequent use of the membership service was expected. Nothing on the website in December 2005 stated that memberships are only to be purchased by persons who have a primary care physician and services are only to be used when that primary care physician is not available.

49. Dr. Boultinghouse’s testimony about patient use of TelaDoc’s services was not at all convincing. It is not rational that consumers with a primary care physician would pay monthly service fees to TelaDoc to be told to go see their primary care physician. Persons with health insurance and a primary care physician have no economic incentive to pay monthly memberships and consultation fees to cover the rare instances when their physicians are unavailable. Legitimate cross coverage arrangements among the physicians are ubiquitous in California, so that the instance where a primary care physician is unavailable and has not designated cross coverage would be rare or nonexistent.

50. Dr. Boultinghouse’s testimony that TelaDoc is a cross coverage service also conflicted completely with the advertisements on the TelaDoc website in December 2005. The website bore the logo “TelaDoc: Affordable Health Care. Talk to Doctor 24/7” and advertised “more convenient, cost-effective medical care.” The website advertisements promote use of TelaDoc’s physicians in lieu of other medical care. An endorsement appearing on the first page of TelaDoc’s website contains a quote from “Mary [mom]” which reads:

My 12-year-old son was complaining of a horrible stomach ache. I considered taking him to the emergency room... instead... I called TelaDoc. The doctor suggested Benadryl and plenty of fluids. I'm thankful that I avoided the time and expense of going to the ER.” (Ellipses in original)

An endorsement appearing on the top of the Medical History Disclosure form contains a quote from “Lisa [Refill Needed]” which reads:

“I needed a prescription refill. The TelaDoc physician took time to thoroughly understand my illness before calling in the refill. This wasn't some doctor out to make a quick buck.”

#### *Analysis of Standard of Care Evidence*

51. Dr. Boultinghouse was a biased and unpersuasive witness, and his opinion was not relevant to the inquiry here. Here, it is clear that respondent was not acting as a cross coverage physician for M. [REDACTED] R. While it may be interesting to examine the structure of TelaDoc and its claim that it can properly provide cross coverage under California law, that is not the inquiry here. TelaDoc is not a party to this proceeding. It is not relevant that Dr. Boultinghouse believes that TelaDoc's physicians provide cross coverage services allowing them to prescribe without a physical examination.

52. Dr. Etherington and Dr. Luce both assumed that respondent was functioning as a cross coverage physician when she consulted with and prescribed for patient M. [REDACTED] R. Their opinions flowed from the assumption that respondent was serving as an on call or cross coverage physician in place of patient M. [REDACTED] R.'s physician. Their opinions were that respondent was within the standard of care for an on call physician in prescribing medications without conducting an examination. As set forth above, respondent was not in fact serving as an on call or cross coverage physician. Respondent knew that patient M. [REDACTED] R. did not have a physician, and she knew that she was not covering during a physician's absence. Accordingly Dr. Etherington and Dr. Luce's opinions as to whether respondent breached the standard of care for on call physicians are not applicable here and must be disregarded. Accordingly, the opinions of Dr. Chapnick and Dr. Hilzinger were uncontroverted.

53. Dr. Chapnick and Dr. Hilzinger were highly qualified and persuasive witnesses. Respondent was unable to undermine their credibility. The evidence is persuasive that respondent's prescribing medications without an examination of patient M. [REDACTED] R. was an extreme departure from the standard of care. The evidence is persuasive that respondent's prescribing medications without taking a comprehensive history and assessing patient M. [REDACTED] R. was an extreme departure from the standard of care. The evidence is persuasive that respondent made erroneous

entries in her chart note for patient M. [REDACTED] R.

### *Mitigation*

54. Respondent's departures from the standard of care were all the result of her failure to recognize that she could not prescribe medications over the telephone without a good-faith medical examination. At hearing, respondent testified that she was aware that California law requires physicians to examine patients when prescribing dangerous drugs. She testified that she discussed this with TelaDoc CEO Michael Gorton and a TelaDoc attorney. They advised her that she could prescribe medications over the phone and without a physical examination because California law permitted her to do so if the patient designated her as the patient's "cross coverage" physician. She was told that TelaDoc requires consumers to agree that its physicians are serving as cross coverage physicians. Respondent accepted this explanation without further investigation and signed up with the TelaDoc Professional Association of Physicians as a contracting physician.

55. As noted above, at the time respondent signed up to serve as a TelaDoc provider, and during her employment with TelaDoc, there was no language on the TelaDoc website which indicated that the services to California residents would be cross coverage services. The California Business and Professions Code was not referenced on the website, nor was there the use of the expression "cross-coverage." There was no advisement or disclosure to the consumer that a California resident could not get a prescription from TelaDoc unless his or her physician was unavailable, and that, even then, drugs would only be prescribed as necessary to maintain the patient until the return of his or her practitioner, but in any case no longer than 72 hours.

56. Further, Michael Gorton and respondent were interviewed by Mr. Hegelein on September 6, 2006. At no time did they refer to TelaDoc as providing cross coverage or on call services. On the contrary, respondent told Mr. Hegelein that it is her practice to ask the patient if they have primary care physicians and if they have none, she tells them they need to follow up with an urgent care center or emergency room. Mr. Gordon told Mr. Hegelein that the vast majority of Californians enrolled in TelaDoc were employees of businesses that signed up with TelaDoc. On October 23, 2006 Mr. Hegelein received a letter from Mr. Gordon with a letter from TelaDoc's corporate counsel. The letter stated that TelaDoc was comprised of a national network of board certified physicians that diagnose and treat its members' "routine medical issues," including the acute, episodic and self-limited."

57. It is apparent that the "cross coverage scenario" claimed by respondent is a fiction that was created as a means to allow California physicians to participate in TelaDoc, avoid following the standard of care in California and avoid following B&P section 2242. Respondent characterizes the issue as one of the patient's freedom of choice to designate their own "cross coverage" physicians. This too is a ruse.

Respondent's lack of forthrightness and her adherence to the "cross coverage scenario" advanced in this hearing undermine any mitigation that might have existed from the fact that all of her violations stem from her error in judgment in participating in telephonic prescribing.

## LEGAL CONCLUSIONS

1. B&P section 2227 provides that a licensee who has violated the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Division deems proper.

### *Gross Negligence*

2. B&P section 2234 provides in relevant part:

The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

(a) Violating or attempting to violate, directly or indirectly, assisting in or of abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, but Medical Practice Act].

(b) Gross negligence...

[¶]...[¶]

(d) Incompetence...

3. The standard of proof which must be met to establish negligence, is "clear and convincing" evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982), 135 Cal.App.3d 853). The burden of proving negligence rests with complainant to offer proof that is clear, explicit and unequivocal - so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

The Medical Practice Act,<sup>3</sup> under which these proceedings were brought, does not define "gross negligence." The Court of Appeal defined "gross negligence" in

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<sup>3</sup> Business and Professions Code sections 2000 through 2528.3.

*Kearl v. Board of Medical Quality Assurance*, as follows:

Gross negligence is "the want of even scant care *or* an extreme departure from the ordinary standard of conduct." (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 941 [123 Cal.Rptr.[page 1053] 563], quoting from *Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 Cal.Rptr. 644].) The use of the disjunctive in the definition indicates alternative elements of gross negligence—both need not be present before gross negligence will be found. (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 196-197 [167 Cal.Rptr. 881].)<sup>4</sup>

*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal. App. 3d 1040, 1052-53.

4. As set forth in the Factual Findings, it was established by clear and convincing evidence that respondent's physician's and surgeon's certificate is subject to discipline pursuant to B&P sections 2227 and 2234, subdivision (b), in that she was grossly negligent in prescribing dangerous drugs to patient M. [REDACTED] R. [REDACTED] without first taking an adequate history and conducting an appropriate physical examination.

5. As set forth in the Factual Findings, it was established by clear and convincing evidence that respondent's physician's and surgeon's certificate is subject to discipline pursuant to B&P sections 2227 and 2234, subdivision (b), in that she was grossly negligent in that she inaccurately and erroneously recorded patient M. [REDACTED] R. [REDACTED]'s symptoms and responses to her diagnostic questions over the telephone, and used same as a basis for prescribing dangerous drugs.

#### *Incompetence*

6. The Accusation alleges that respondent was incompetent and in violation of B&P section 2234, subdivision (d), in that she inaccurately and erroneously recorded patient M. [REDACTED] R. [REDACTED]'s symptoms and responses to her diagnostic questions over the telephone, as a basis for prescribing dangerous drugs. As set forth in the Factual Findings, there was no medical opinion offered that respondent was incompetent.

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<sup>4</sup> The disjunctive definition set forth in *Gore* was also followed in *Yellen v. Board. of Medical Quality Assurance* (1985) 174 Cal. App. 3d 1040, 1058.

### *Unprofessional Conduct*

7. B&P section 2238 states:

A violation of any federal statute or federal regulation or any of the statutes or regulations of the state regulating dangerous drugs or controlled substances constitutes unprofessional conduct.

8. B&P section 4022 provides in pertinent part:

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in humans or animals, and includes the following:

(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a \_\_\_\_\_," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006.

9. B&P section 2242 provides in pertinent part:

(a) Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4022 without an appropriate prior examination and a medical indication, constitutes unprofessional conduct.

(b) No licensee shall be found to have committed unprofessional conduct within the meaning of this section if, at the time the drugs were prescribed, dispensed, or furnished, any of the following applies:

(1) The licensee was a designated physician and surgeon or podiatrist serving in the absence of the patient's physician and surgeon or podiatrist, as the case may be, and if the drugs were prescribed, dispensed, or furnished only as necessary to maintain the patient until the return of his or her practitioner, but in any case

no longer than 72 hours.

[¶]...[¶]

10. As set forth in the Factual Findings, it was established by clear and convincing evidence that respondent's physician's and surgeon's certificate is subject to discipline pursuant to B&P sections 2227 and 2242, in that she committed unprofessional conduct by improperly prescribed dangerous drugs to patient M.R., without taking an adequate patient history and without conducting an appropriate medical examination to establish a medical indication for the prescriptions.

#### *Failure to Maintain Adequate and Accurate Records*

11. B&P section 2266 states:

The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct.

12. As set forth in the Factual Findings, it was established by clear and convincing evidence that respondent's physician's and surgeon's certificate is subject to discipline pursuant to B&P sections 2227 and 2266, in that she committed unprofessional conduct by failing to keep and maintain adequate and accurate records of her telephonic communication with and diagnosis of patient M. [REDACTED] R. [REDACTED].

13. All contentions of the parties not specifically addressed herein were considered and are rejected.

#### *Disciplinary Considerations*

14. The purpose of professional disciplinary actions is not to punish the licensee, but to protect the public from being harmed by the licensee. Respondent's violations sprung from her attempt to practice medicine with California patients, without having to return to the State of California. She does not intend to return to California to practice medicine. Nevertheless, respondent's physician's and surgeon's certificate permits her to practice medicine within California, should she decide to return. To protect the public, complainant requests a stayed revocation of respondent's certificate, with a five-year probationary period, on terms and conditions, including appropriate remedial education in prescribing practices and record keeping and imposition of a practice monitor.

A standard term and condition of probation, entitled "Residing or Practicing Out-of-State" states in pertinent part:

In the event respondent should cease practicing medicine in the State of California, respondent shall notify the Board or its designee in writing 15 calendar days of such non-practice. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Board or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Comply with Directions of Probation Unit and Probation Monitoring Costs.

**Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state. (emphasis added)**

15. Accordingly, a nonresident physician who is placed on probation to the Board and does not return to practice in California is placed in a position where her certificate will be automatically canceled in two years. If she is practicing medicine in another state and has been placed on probation by that state board, her California certificate will be automatically canceled two years after the out-of-state probation ends. In either circumstance, imposition of probation on the nonresident physician who does not return to California ultimately results in a de facto revocation of the certificate. Thus, imposition of a probationary term on respondent's certificate will serve no rehabilitative or protective purpose and will instead be punitive. A term of suspension with the opportunity to reduce the term by completion of courses


appropriate to the misconduct is adequate to protect the public and to correct respondent's errors.

16. Respondent maintains that the Board is using her as a scapegoat in an effort to put an end to telemedicine. She argues that she should not be disciplined for her participation in the TelaDoc enterprise and that she is being made an example of to discourage other California physicians from participating in enterprises like TelaDoc. However, TelaDoc is not a party to this action. The Board is imposing discipline against respondent's certificate after a full and contested evidentiary hearing in which her practice of medicine was evaluated under laws and regulations governing the practice of medicine in California. Appropriate discipline is meted out to protect the public from respondent's further violations. Discipline against any physician, including respondent, has the potential to deter other physicians from engaging in the practices giving rise to the discipline. This is not a nefarious scheme: it is a fortunate by-product of discipline.

#### ORDER

Physician's and Surgeon's Certificate No. G 75089 issued to respondent Maria Helen Melbourne Hayes M.D. is **SUSPENDED** for a period of 270 days, commencing on the effective date of this Decision. Said suspension shall be stayed for a period of 120 days upon proof to the satisfaction of the Board or its designee that respondent has successfully completed a minimum of 40 hours of educational courses, which shall be preapproved by the Board or its designee. Said courses shall include a course on Ethics, a course on prescribing practices and a course on record keeping/charting. The educational program(s) or course(s) shall be at respondent's expense and shall be in addition to the Continuing Medical Education requirements for renewal of licensure. The educational program(s) or course(s) shall not be completed on line or by mail and shall be completed in a classroom setting.

Date: June 17, 2009

  
ANN ELIZABETH SARLI  
Administrative Law Judge  
Office of Administrative Hearings

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8

9 **BEFORE THE**  
10 **DIVISION OF MEDICAL QUALITY**  
11 **MEDICAL BOARD OF CALIFORNIA**  
12 **DEPARTMENT OF CONSUMER AFFAIRS**  
13 **STATE OF CALIFORNIA**

14 In the Matter of the Accusation Against:

15 MARIA HELEN MELBOURNE HAYES, M.D.  
16 PO Box 463  
East Moriches, NY 11940-0463

17 Physician and Surgeon No. G 75089

Respondent.

Case No. 20-2005-171087

**ACCUSATION**

18 Complainant alleges:

19 PARTIES

20 1. David T. Thornton (Complainant) brings this Accusation solely in his  
21 official capacity as the Executive Director of the Medical Board of California, Department of  
22 Consumer Affairs.

23 2. On or about September 1, 1992, the Medical Board of California issued  
24 Physician and Surgeon Number G75089 to Maria Helen Melbourne Hayes, M.D. (Respondent).  
25 The Physician and Surgeon's certificate was in full force and effect at all times relevant to the  
26 charges brought herein and will expire on February 29, 2008, unless renewed.

27 JURISDICTION

28 3. This Accusation is brought before the Division of Medical Quality

FILED  
STATE OF CALIFORNIA  
MEDICAL BOARD OF CALIFORNIA  
SACRAMENTO May 22, 20 07  
BY Jury Cummins ANALYST

1 (Division) for the Medical Board of California, Department of Consumer Affairs, under the  
2 authority of the following laws. All section references are to the Business and Professions Code  
3 unless otherwise indicated.

4           4.       Section 2227 of the Code provides that a licensee who is found guilty  
5 under the Medical Practice Act may have his or her license revoked, suspended for a period not  
6 to exceed one year, placed on probation and required to pay the costs of probation monitoring, or  
7 such other action taken in relation to discipline as the Division deems proper.

8           5.       Section 2234 of the Code states in relevant part:

9           "The Division of Medical Quality shall take action against any licensee who is  
10 charged with unprofessional conduct. In addition to other provisions of this article,  
11 unprofessional conduct includes, but is not limited to, the following:

12           "(a) Violating or attempting to violate, directly or indirectly, assisting in or  
13 abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5,  
14 the Medical Practice Act].

15           "(b) Gross negligence." . . .

16           "(d) Incompetence. . .".

17           6.       Section 2238 of the Code states:

18           "A violation of any federal statute or federal regulation or any of the statutes or  
19 regulations of this state regulating dangerous drugs or controlled substances constitutes  
20 unprofessional conduct."

21           7.       Section 2242 of the Code states:

22           "(a) Prescribing, dispensing, or furnishing dangerous drugs as defined in Section  
23 4022 without an appropriate prior examination and a medical indication, constitutes  
24 unprofessional conduct.

25           "(b) No licensee shall be found to have committed unprofessional conduct within  
26 the meaning of this section if, at the time the drugs were prescribed, dispensed, or  
27 furnished, any of the following applies:

28           "(1) The licensee was a designated physician and surgeon or podiatrist serving in

1 the absence of the patient's physician and surgeon or podiatrist, as the case may be, and if  
2 the drugs were prescribed, dispensed, or furnished only as necessary to maintain the  
3 patient until the return of his or her practitioner, but in any case no longer than 72 hours.

4 "(2) The licensee transmitted the order for the drugs to a registered nurse or to a  
5 licensed vocational nurse in an inpatient facility, and if both of the following conditions  
6 exist:

7 "(A) The practitioner had consulted with the registered nurse or licensed  
8 vocational nurse who had reviewed the patient's records.

9 "(B) The practitioner was designated as the practitioner to serve in the absence of  
10 the patient's physician and surgeon or podiatrist, as the case may be.

11 "(3) The licensee was a designated practitioner serving in the absence of the  
12 patient's physician and surgeon or podiatrist, as the case may be, and was in possession of  
13 or had utilized the patient's records and ordered the renewal of a medically indicated  
14 prescription for an amount not exceeding the original prescription in strength or amount  
15 or for more than one refill.

16 "(4) The licensee was acting in accordance with Section 120582 of the Health and  
17 Safety Code."

18 8. Section 2266 of the Code states: "The failure of a physician and surgeon to  
19 maintain adequate and accurate records relating to the provision of services to their patients  
20 constitutes unprofessional conduct."

### 21 **REFERENCED DANGEROUS DRUGS<sup>1</sup>**

22 *Acetaminophen; Tramadol Hydrochloride* (generic name). "Ultracet" (brand  
23 name). Tablets containing 37.5 mg tramadol hydrochloride and 325 mg acetaminophen. Light  
24 yellow in color. Indicated for short-term (5 days or less) management of acute pain.

25 *Ibuprofen* (generic name). "Motrin", "Advil" (brand names). Nonsteroidal anti-  
26 inflammatory agent, available in 400, 600 and 800 mg tablets. Indicated for relief of mild to  
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28 1. Drug descriptions obtained from *Mosby's Drug Consult*, © Mosby, Inc. (2005).

1 moderate pain, for relief of the signs and symptoms of rheumatoid arthritis and osteoarthritis.

2           *Cyclobenzaprine Hydrochloride* (generic name). "Flexeril" (brand name). A 5  
3 and 10 mg tablet. Indicated as an adjunct to rest and physical therapy for relief of muscle spasm  
4 associated with acute, painful musculoskeletal conditions.

5                                   FIRST CAUSE FOR DISCIPLINE

6                                   (Gross Negligence)

7                                   [Bus. & Prof. Code Section 2234 (b)]

8           9.       Respondent is subject to disciplinary action under section 2234 (b) of the  
9 Code in that her conduct in prescribing dangerous drugs to a patient without first taking an  
10 adequate history and conducting an appropriate physical examination of the patient constitutes  
11 gross negligence. The circumstances are as follows:

12           A.       On or about December 5, 2005, sworn investigative personnel of  
13 the Medical Board of California were informed of a television news program entitled "On The  
14 Money" produced by CNBC, a cable news channel, in which a company known as  
15 "TeleDoc.com (hereafter "TeleDoc") was described as providing prescription medications by  
16 internet and telephone. After reviewing a tape of this program, sworn investigative Medical  
17 Board staff concluded that California physicians working within the TeleDoc.com business  
18 program may be violating Business and Professions Code sections 2234 and 2242, in that they  
19 may be prescribing dangerous drugs to patients without first taking an adequate patient history  
20 and then conducting a prior, good faith medical examination of the patient, as required by section  
21 2242 of the Code. Investigative staff thereafter conducted an undercover operation to determine  
22 whether TeleDoc physicians, licensed in California, were in violation of the Code.

23           B.       On or about December 19, 2005, Andrew Hegelein, Supervising Senior  
24 Investigator for the Medical Board of California (MBC), entered the TeleDoc.com internet  
25 website from a Medical Board computer and registered an account for an undercover identity  
26 "M.R.". An investigator provided TeleDoc.com with a previously established undercover credit  
27 card number, an address, and telephone number in conjunction with the investigation, and listed  
28 a Walgreens drug store in Carmichael, California as the patient's preferred pharmacy. Assisted  
by another MBC staff member, Mr. Hegelein completed an on-line questionnaire by checking

1 “yes” or “no” to medical questions and listed a fictitious primary care provider (PCP) with  
2 Mr. Hegelein’s mobile telephone number as the PCP contact number. On or about December  
3 23, 2005, Mr. Hegelein received authorization from the Office of the Attorney General,  
4 California Department of Justice, to surreptitiously record telephone conversations which might  
5 occur relative to Mr. Hegelein’s internet contact with TeleDoc.com. or its contract physicians.<sup>2</sup>  
6 On or about December 23, 2005, Mr. Hegelein telephoned TeleDoc at their listed toll-free  
7 telephone number, 1-800-835-2362, and spoke with a TeleDoc representative identified as  
8 “Jennifer”. Jennifer advised Mr. Hegelein that a TeleDoc physician would contact him by  
9 telephone for a consultation. At approximately 1140 hours that same day, respondent physician  
10 Maria M. Hayes, M.D. called Mr. Hegelein. The conversation was recorded. Mr. Hegelein,  
11 serving undercover as patient “M.R.”, complained of pain that began in his lower back over an  
12 eighteen month period, but that was now located in his upper back, neck and shoulders. The pain  
13 was described as chronic. “M.R.” advised respondent he had been taking Vicodin and wanted  
14 more for pain control. Respondent explained that TeleDoc could not prescribe Vicodin because  
15 it was a controlled substance. She asked patient “M.R.” a few question about his pain, focusing  
16 on its location, radiation, and whether the patient had experienced any weakness or tingling in the  
17 arms or legs. Respondent asked “M.R.” whether he ever saw a physician about his pain, and  
18 Mr. Hegelein, as “M.R.”, said he had not. At no time did respondent ask “M.R.” whether his  
19 symptoms were accompanied by fever, chills, nausea, vomiting, stiff neck, chest pain, shortness  
20 of breath, weight loss, changes of sensation in the “saddle” area, bowel or bladder problems,  
21 difficulty walking—any or all of which might have suggested that the patient required urgent or  
22 emergent intervention to prevent death or disability.

23 C. In her medical record for patient “M.R.” respondent indicated that the  
24 patient had pain for two (2) days without significant trauma, suggesting a minor, acute and self-  
25 limiting condition. Respondent failed to record that “M.R.” had complained that his pain had  
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28 2. Pursuant to Penal Code Section 633; *see Rattray v. City of National City*, (1994) 36  
F.3d 1480 (Ninth Circuit Court of Appeals).

1 occurred over eighteen months and had worsened and spread, which could point to a more  
2 serious condition or disease. Respondent instead erroneously recorded only a two-day onset of  
3 back and neck pain. At no time did respondent suggest or order diagnostic follow-up or advise  
4 the patient to seek such attention from his primary care physician. Respondent conducted no  
5 physical examination of the patient and did not request or acquire any record of a prior physical  
6 examination of the patient before diagnosing his condition as minor and self-limiting, and  
7 prescribing dangerous drugs therefor. Respondent prescribed Motrin 800 mg, every 8 hours as  
8 needed, with a ten (10) day supply, Flexeril 10 mg. every 12 hours as needed, with a five (5) day  
9 supply, and Ultracet every 8 hours as needed, with a four (4) day supply. Mr. Hegelein, as  
10 patient "M.R.", thereafter received these three medications at the Walgreens Pharmacy location  
11 he had listed with TeleDoc.com in Carmichael, California, on or about January 4, 2006. At no  
12 time did anyone from TeleDoc.com call the mobile telephone number Mr. Hegelein had provided  
13 as the contact number for his fictitious Primary Care Physician.

14 10. Respondent's failure to take an adequate patient history from patient  
15 "M.R." as described herein above, and her failure to conduct a prior, good faith medical  
16 examination of this patient before prescribing dangerous drugs, constitutes gross negligence  
17 subject to discipline within the meaning of section 2234 (b) of the Code.

18 SECOND CAUSE FOR DISCIPLINE  
19 (Gross Negligence)  
[Bus. & Prof. Code Section 2234 (b)]

20 11. Complainant re-alleges paragraph 9, above, and incorporates it by  
21 reference herein as if fully set forth at this point.

22 12. Respondent is subject to discipline with the meaning of section 2234 (b) of  
23 the Code in that her inaccurate and erroneous recording of patient "M.R.'s" symptoms and  
24 responses to her diagnostic questions over the telephone as a basis for prescribing dangerous  
25 drugs constitutes gross negligence.

26 THIRD CAUSE FOR DISCIPLINE  
27 (Incompetence)  
[Bus. & Prof. Code Section 2234 (d)]

28 13. Complainant re-alleges paragraph 9, above, and incorporates it by

1 reference herein as if fully set forth at this point.

2 14. Respondent is subject to discipline with the meaning of section 2234 (d) of  
3 the Code in that her inaccurate and erroneous recording of patient "M.R.'s" symptoms and  
4 responses to her diagnostic questions over the telephone as a basis for prescribing dangerous  
5 drugs demonstrates incompetence.

6 FOURTH CAUSE FOR DISCIPLINE

7 (Improper Prescribing)

[Bus. & Prof. Code Section 2242]

8 15. Complainant re-alleges paragraph 9, above, and incorporates by reference  
9 herein as if fully set forth at this point.

10 16. Respondent's failure to take an adequate patient history from patient  
11 "M.R." as described herein above and to conduct an appropriate medical examination of this  
12 patient prior to prescribing dangerous drugs based on a medical indication therefor, constitutes  
13 unprofessional conduct subject to discipline within the meaning of section 2242 of the Code.

14 FIFTH CAUSE FOR DISCIPLINE

15 (Failure To Keep And Maintain Adequate And Accurate Records)

[Bus. & Prof. Code Section 2266]

16 17. Complainant re-alleges paragraph 9, above, and incorporates it by  
17 reference herein as if fully set forth at this point.

18 18. Respondent is subject to discipline within the meaning of section 2266 of  
19 the Code in that she failed to keep and maintain adequate and accurate records of her telephonic  
20 communication with and diagnosis of patient "M.R.". Incident to prescribing dangerous drugs  
21 for this patient, respondent noted only that the patient had experienced pain for two days, when in  
22 fact the patient reported chronic pain occurring over an eighteen month period, worsening and  
23 spreading to other bodily areas more recently, thus suggesting the possibility of a more serious  
24 condition or disease than that which respondent diagnosed and recorded as the medical indication  
25 for her prescription(s).

26 PRAYER

27 WHEREFORE, Complainant requests that a hearing be held on the matters herein  
28 alleged, and that following the hearing, the Division of Medical Quality issue a decision:

- 1                   1.       Revoking or suspending Physician and Surgeon Number G75089, issued  
2 to Maria Helen Melbourne Hayes, M.D.;
- 3                   Revoking, suspending or denying approval of Maria Helen Melbourne Hayes,  
4 M.D.'s authority to supervise physician's assistants, pursuant to section 3527 of the Code;
- 5                   2.       If placed on probation, ordering Maria Helen Melbourne Hayes, M.D. to  
6 pay the Division the costs of probation monitoring;
- 7                   3.       Taking such other and further action as deemed necessary and proper.
- 8

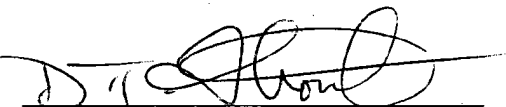
9 DATED: May 22, 2007

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14   
15 DAVID T. THORNTON  
16 Executive Director  
17 Medical Board of California  
18 Department of Consumer Affairs  
19 State of California  
20 Complainant

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22 Accusation.wpd  
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